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William H. Lane, Inc.
Case 3-CA-16664

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512-5078-2050
512-5084-7500
518-4040-6701-3300
512-5036-6720-4300
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This Section 8(a)(3) case was submitted for advice as to whether, after the expiration of a Section 8(f) contract and the filing of an election petition by a union seeking 9(a) status, an employer is privileged to recognize another labor organization as the representative of the unit employees, embody that recognition in an 8(f) contract, and require employees to work under that contract.

FACTS

The Employer, which is engaged in the building and construction industry, has long had Section 8(f) contracts in separate units with Laborers Local 7, and Carpenters Local 281, respectively. Both the Laborers' and the Carpenters' contracts expired on May 15, 1991.[1] On June 24, the Carpenters reached a three-year collective-bargaining agreement with the Employer, retroactively effective to May 15. However, the Laborers and the Employer engaged in protracted bargaining without reaching agreement. During the period of bargaining, the Employer applied all the terms of the expired contract to the employees in the Laborers' unit. On September 20, based on its expired contract with the Employer, the Laborers filed with the Region an election

[1] Unless otherwise noted, all dates hereafter are in 1991.

petition in order to become the Section 9(a) representative of the Employer's unit employees.[2]

The Region held three days of hearing in mid-October. The Employer opposed the petition on the grounds that the historical unit no longer existed, in that the laborers were neither a craft unit nor a clearly identifiable group possessing a separate community of interest. The Employer argued that the functions formerly performed by employees in the Laborers' unit were now being performed by employees in the Carpenters' unit, under the Carpenters' contract,[3] and that there were no clear lines of demarcation between the current Carpenters' and Laborers' work. The Carpenters intervened, attended the hearing, and merely took the position that it did not oppose a unit represented by the Laborers performing work historically performed by the Laborers.

On October 17, the first day of the hearing, the Employer's president testified that all work formerly performed by the Laborers would be assigned and performed from that point forward under the Carpenters' contract. On October 21, the second day of the hearing, the Employer delivered to the Laborers a letter in which the Employer repudiated its bargaining relationship with the Laborers. At that time, there were still seven Laborers members on the Employer's payroll. The Employer told six of them that inasmuch as the Employer could not reach agreement with the Laborers, they could choose either to be laid off or to "continue to work under the terms of the Carpenters' Agreement." All six chose layoff. The Employer offered no similar choice to the seventh employee, Brian Corry, who was working at a project apart from the others. Instead, an Employer superintendent laid him off. The superintendent told Corry that although the Employer's vice-president had been told that there was work for laborers like Corry to do, the Employer's vice-president responded that he "did not want any Laborers on the project." The instant charge was filed on October 25 and amended on December 23. In view of the probability that Section 8(a)(2) allegations would block the conclusion of the representation case, the Laborers specifically limited the charge to Section 8(a)(1) and (3) allegations.

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[2] In Stockton Roofing Co., 304 NLRB No. 88 (1991), the Board held that expired Section 8(f) contracts satisfy the requirement of a showing of interest.

[3] The 1991-1994 Carpenters' contract provides for certain helpers who perform the same essential tasks as, but earn substantially less than the wages paid to, laborers under the expired Laborers' contract.

On January 9, 1992, the Region directed an election in the "historical" unit of all construction laborers employed by the Employer and two other construction firms,[4] on the grounds that no recent events were of such magnitude as to destroy the appropriateness of a separate unit of laborers. The Region did not place the Carpenters on the ballot. The Employer and the Carpenters filed requests for review.[5] On February 10, 1992, the Board denied both requests for review. Thereafter, the Region conducted an election, in which 29 eligible voters cast ballots for the Laborers and one voted against representation. Another 46 employees, all members of the Carpenters union, cast challenged ballots. The Region is currently conducting hearings to determine which of these employees, if any, meet the eligibility standards set forth in the Decision and Direction of Election.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(3) and (1) by discharging Brian Corry and by constructively discharging the six other employees whom it forced to choose between layoff and representation by the Carpenters, even though no Section 8(a)(2) charge has been filed.

1. The Employer violated Section 8(a)(3) and (1) by discharging Brian Corry, and by constructively discharging the six employees whom it forced to choose between layoff and representation by the Carpenters assuming, as discussed more fully below, that the Employer was not privileged to recognize the Carpenters.

As to Corry, the Board has held that even in the construction industry, an employer's otherwise lawful selection or removal of a representative for his employees, under Section 8(f), does not also privilege the discharge of employees because of their membership or non-membership in a

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[4] The parties had stipulated that any election should be held in a multi-employer unit although each employer's employees previously constituted separate units.

[5] The Carpenters' request for review stated that the Carpenters had expanded its jurisdiction by virtue of a merger, in November 1988, between Carpenters International Union and Tile, Marble, Terazzo Finishers, Shopworkers, and Granite Cutters International Union (TMT). It claimed, inter alia, that in the geographical area, work formerly performed by the Laborers is increasingly being assigned to employees represented by the Carpenters. The Carpenters expressed a desire to appear on the ballot.

union. Thus, in Jack Welsh Co.,[6] the Board held that after an employer terminated its 8(f) relationship, its discharge of three employees because of their membership in the union was violative of Section 8(a)(3). Since Corry was discharged simply because he was a member of the Laborers, the Employer violated Section 8(a)(3).

As to the other employees, employer conduct constitutes an unlawful constructive discharge when the employer imposes additional burdens on an employee because of union considerations and when the burdens were intended to cause, and caused, changes in working conditions so difficult or unpleasant as to cause the employee to resign.[7] The Board has long held that after the unlawful execution of a collective-bargaining agreement with a nonmajority union, requiring existing employees to accept the terms of the new contract in order to work violates Section 8(a)(3) and (1). Thus, in John B. Shriver Co., [8] the employer, who had signed a collective-bargaining agreement with a minority union, informed an employee that he must pay dues to the union pursuant to the union-security clause or be discharged. The Board found that this conduct was a constructive discharge in violation of Section 8(a)(3). Similarly here, conditioning the employment of Laborers members, who had formerly been represented by the Laborers and whose Union had filed a petition seeking 9(a) representative status, on their acceptance of the terms of the Carpenters' collective-bargaining agreement constituted constructive discharges if the application of that contract to the Laborers unit was unlawful.

2. We conclude that the Employer violated the Act by extending 8(f) recognition to the Carpenters for, and by applying the Carpenters' contract to, the unit formerly represented by the Laborers after the Laborers had filed its election petition seeking 9(a) status.

In Midwest Piping and Supply Co., 63 NLRB 1060 (1945), the Board found that the employer's recognition of, and entry into a collective-bargaining agreement with, the Steam & Gas Fitters, at a time when the Steelworkers enjoyed majority status in a unit, and the employer knew that the Steam & Gas Fitters did not enjoy majority status in the unit and that a Steelworkers' petition was pending, was violative of Section 8(a)(1) and (3). According to the Board, the Act imposed on the employer a duty of strict

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[6] 284 NLRB 378 (1987).

[7] Manufacturing Services, Inc., 295 NLRB 254, 255 (1989).

[8] 103 NLRB 23, 43-44 (1953).

neutrality when two unions are engaged in organizing, and it is the Board's exclusive province to exercise the power granted to it by Congress to determine the exclusive 9(a) bargaining agent. The Board's orderly processes, which normally incorporate a secret ballot election, decrease the probability of error in the designation of the majority union, and thereby also decrease the probability of the precise labor disputes the Act is designed to prevent. The Board noted that if an election were conducted before the violation were remedied, the probability of error would not be sufficiently minimized because the employer's recognition had given the Steam & Gas Fitters unwarranted prestige and thereby interfered with the free exercise of Section 7 rights.

In later cases, the Board extended the Midwest Piping doctrine to situations where no election was pending, but where there might be industrial "chaos" in the employer's operation during the pendency of the Board proceedings. [9] Thus, the Board reiterated that cards are a notoriously bad way of determining majority status where competing unions are soliciting cards, because many employees signed cards for several unions and the extent of duplicate cards is unknown to all the parties.[10]

In Bruckner Nursing Home,[11] a case in which rival unions were engaged in initial organizing, the Board reevaluated the Midwest Piping policies by recognizing a competing policy of promoting collective bargaining through reducing the danger that a rival union with a small percentage of cards could forestall collective bargaining until there was an election. Therefore, the Board held that an employer may recognize an unassisted labor organization which represented an uncoerced majority before a valid petition had been filed with the Board. However, when an employer is notified of the petition, Midwest Piping applies: the employer must not recognize any of the rivals. In sum, the duty of employer neutrality and the necessity of a Board conducted election attach once one of the rivals has filed a proper petition.[12]

We conclude that Midwest Piping/Bruckner principles apply to Section 8(f) situations. In John Deklewa & Sons,

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[9] Sunbeam Corporation, 99 NLRB 546, 550-554 (1952).
[10] Id. at 551, quoting Midwest Piping, 63 NLRB at 1070.
[11] 262 NLRB 955 (1982).
[12] 262 NLRB at 957-958.

[13] the Board held that 8(f) contracts confer limited 9(a) status on the signatory union, but that:
[Section 8(f)] agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e)... [and] upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and each party may repudiate the 8(f) bargaining relationship.

However, subject to the above caveats, nothing in Deklewa "is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." [14] Moreover, "in the event of an election, a vote in favor of the signatory union, or a rival union, will result in that union's certification and the full panoply of Section 9 rights and obligations."[15] Thus, the Board has held that after the expiration of the contract, the employer is free to withdraw recognition from, and refuse to bargain with, the former incumbent, and to unilaterally change wage rates.[16] Also, in San Antonio Control Systems, [17] the Board made clear that the employer was free, inter alia, to refuse to furnish data requested by the former incumbent union during bargaining for a new contract. However, it does not follow from such cases that after the former incumbent has filed a petition, the employer can both withdraw recognition from that incumbent and recognize another union in its place.

In this case, after the Laborers filed its election petition seeking 9(a) status, the Employer withdrew recognition from the Laborers and bestowed it on the Carpenters. We would argue that this conduct is violative of Section 8(a)(1) and (2) because it exceeded what Deklewa permits and, under Midwest Piping/Bruckner principles, conferred on the Carpenters unwarranted prestige tending to interfere with the unit employees' free exercise of Section 7 rights to select a 9(a) representative. In this regard, there is no justification to confer on the Laborers "less favored status" than it would enjoy outside the construction industry.[18]

3. Neither our failure to allege in a complaint herein that the Employer's Section 8(a)(2) conduct constituted an

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[13] 282 NLRB 1375, 1377-1378 (1987), enfd. 843 F.2d 770 (3d Cir. 1989).
[14] Id. at 1387 n. 53.
[15] Id. at 1385.
[16] Yellowstone Plumbing, 286 NLRB 993 (1987).
[17] 290 NLRB 786 (1988).
[18] Deklewa, supra at fn. 53.

unfair labor practice nor the policies underlying the Board's "blocking charge" rules warrants a conclusion that the discharges were not violative of Section 8(a)(3).

Essential to a finding that the Employer unlawfully forced certain employees to choose between layoff and representation by the Carpenters is a finding that the Employer unlawfully extended recognition to the Carpenters for, and applied the Carpenters' contract to, the unit formerly represented by the Laborers after the Laborers had filed its petition. Such a finding normally establishes a violation of Section 8(a)(2). However, the Board need not find and remedy the Section 8(a)(2) violation in order to find and remedy the alleged 8(a)(3) violation.[19]

Additionally, if the Laborers had filed a Section 8(a)(2) charge, further processing of its petition may have been suspended until the allegedly unlawful conduct had been adjudicated. The Board grants "waivers" of this practice only in special circumstances.[20] We would argue that the Laborers should not be faulted for having decided not to delay the determination of 9(a) representative status during the pendency of Section 8(a)(2) proceedings, especially since it is not clear that a Carlson waiver could have been obtained.[21] At the same time, we are not attempting an "end run" around the exceptional circumstances required to secure a Carlson waiver by asking the Board essentially to make an 8(a)(2) finding where no 8(a)(2) charge has been filed. Thus, we are not seeking a determination in this proceeding that the Employer's contract with the Carpenters is void because it is unlawful under Section 8(a)(2). However, if the Laborers is certified as a result of the election, the Employer's contract with the Carpenters would be void. See

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[19] See Local 30, Longshoremen (U.S. Borax and Chemical), 223 NLRB 1257 (1976), enfd. 549 F.2d 698 (9th Cir. 1977), where the Board found that the union violated Section 8(b)(1)(A) for disciplining a member-employee because he had crossed an unlawful secondary picket line, without also finding that the secondary picketing violated Section 8(b)(4)(B), since the latter allegation would have been barred by Section 10(b).

[20] Carlson Furniture Industries, 157 NLRB 851 (1966). A Carlson waiver normally requires that the Board have already determined whether a contract is a bar to an election by adjudicating the merits of the 8(a)(2) allegation. Mistletoe Express, 268 NLRB 1245, 1247 (1984). Waivers have also been granted where a blocking charge involved a union which was not a party to the election or where a national emergency outweighing all other considerations could be resolved only by an election. Cf. Town & Country, 194 NLRB 1135, 1136 (1972).

[21] In this regard, while the 8(f) contract would not bar the election under any circumstances (Deklewa, supra), an 8(a)(2) blocking charge herein would involve the Carpenters which has intervened in the election proceeding. See Town & Country, supra, at 1136.

Deklewa at 1385 and RCA Del Caribe, 262 NLRB 963, 966 (1982).

R.E.A.